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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA Plaintiff, vs. STEVEN CARROLL DEMOCKER, Defendant.	No. P1300CR20081339 Division 6 **DEFENDANT'S SUPPLEMENTAL BENCH MEMORANDUM ON CHRONIS ISSUES**

At the conclusion of the State's evidence last week (on November 4, 2009), the Court invited both parties to submit simultaneous memoranda addressing our views on the law and the facts developed during the State's presentation in this hearing. On behalf of Defendant Steven DeMocker, we offer this Memorandum. We will first summarize briefly what we understand to be the present state of the proceedings. We will then offer our views on whether substantial evidence supports each of the five aggravating circumstances alleged by the State. For the reasons set forth below, we respectfully urge that an examination of the relevant law regarding each of the five

aggravators confirms that there is no proof sufficient to establish probable cause that would warrant continuing to treat this as a capital case.

I. THE PROCEEDINGS TO DATE.

This Court and the parties have agreed that the recent Arizona Supreme Court opinion in *Chronis v. Steinle,* 220 Ariz. 559, 208 P.3d 210 (2009) requires that the State produce substantial evidence supporting each aggravating circumstance that might eventually justify the death penalty. Toward that end, the State produced four witnesses. The defense cross-examined those witnesses. The State (and the defense) asked the Court to take judicial notice of selected testimony from the hearing in this matter held earlier this year to determine whether the State could meet the "proof evident and presumption great" necessary to render Mr. DeMocker ineligible for bail pending trial (referred to throughout these proceedings as the *Simpson* hearing). Numerous exhibits were also admitted during the last five days of hearings.

These proceedings, as directed by the *Chronis* opinion, were "generally" guided by the familiar steps set forth in Rule 5 of the Rules of Criminal Procedure for use in preliminary hearings. While a rigid adherence to Rule 5 might have dictated that this Court make a finding of probable cause as to each aggravator at the end of the State's presentation, the parties and the Court agreed during an on-the-record, in-chambers conference on November 4 to adjourn for a few days so that we all might digest and review the evidence to date. We also agreed that before the defense on behalf of Mr. DeMocker offers the testimony of its forensic accounting expert, we would pause for this exchange of memoranda and also have a further conference and conversation about the application of the law to the facts. That conference is now scheduled for November 17 and the testimony of Mr. DeMocker's forensic accountant, Mr. Gregg Curry, is scheduled for November 19. The defense has now also provided to the State Mr. Curry's curriculum vitae and a summary of his opinions at this stage of the case regarding the *Chronis* issues at hand.

For the following specific reasons, we submit that there is insufficient evidence to support any of the five alleged aggravating circumstances as the law regarding those factors has developed in Arizona. We address those factors in what we believe is the order of their complexity, beginning with the least disputable.

II. FIVE AGGRAVATING CIRCUMSTANCES ALLEGED IN THE INDICTMENT.

(1) "Cold, Calculated" Offense: (F)(13).

We addressed in our Motion to Dismiss the Death Penalty Notice for Lack of Probable Cause or, in the Alternative, for a Probable Cause Hearing on the State's Noticed Aggravating Circumstances, filed on August 25, 2009 (herein the "DeMocker Motion to Dismiss") the law underlying this aggravator. This aggravator, when proposed, was intended to serve a narrow purpose. It was designed to address the narrow class of cases that might be called "thrill kill" homicides. (DeMocker Motion to Dismiss at 8-9) The Legislature was assured that this proposal would not open a floodgate to death notices in all allegedly planned homicides. Since the filing of that Motion, we have received from the State Legislative Counsel's staff a CD containing the transcript of the Senate Judiciary Committee hearing of February 14, 2005 on Senate Bill 1429, which included this and other proposed amendments to the list of capital aggravators. That transcript confirms in unmistakable terms that neither the proponents in the prosecutorial community nor the Members of the Senate Judiciary Committee intended this aggravator to apply in cases other than the rare situation involving such events as gang-initiation killings and the like. We attach to this Memorandum that transcript in its entirety (Ex. 1, and *see especially* pp. 5-6). On behalf of the prosecutorial sponsors of the Bill, Paul McMurdie (now a Superior Court Judge), explained that this aggravator was likely to be used in "just a handful" of cases. He summarized a case from the Maricopa County Attorneys' Office in which two individuals spent two months plotting a random killing just for the thrill of killing. *Id.*

The evidence offered over the first five days of this hearing has provided nothing to support this aggravator. To the contrary, the evidence would seem to suggest a killing that was not thrill-seeking violence. The evidence does not suggest that the homicide was carefully constructed by a cold, careful killer. We have pondered whether Detective Steve Page's testimony might have been offered in support of this aggravator. Specifically, we have considered whether the proffered testimony about materials found in Mr. DeMocker's "book research" file on his personal computer might be claimed to be research for a carefully planned killing. If that is what was intended by the State, we think the suggestion fanciful and self-defeating. Detective Page could offer no proof that Mr. DeMocker's research had any similarity to Carol Kennedy's tragic death and, therefore, makes the "book research" connection nothing more than pure speculation, not evidence.

Even if one might conjure a daisy chain of hypothetical steps that could connect the dots, it should nonetheless be evident that this kind of proof is not at all what either the proponents or the Arizona Legislature had in mind when this aggravator was added. If the "cold, calculated" concept were stretched today to cover this case it could only happen by abandoning the bedrock Constitutional principle that aggravators are intended to serve the critically important need to narrow the class of homicides charged as capital crimes. Little additional time, and no additional evidentiary presentation, is needed here.

(2) Killing to Prevent Cooperation with Official Law Enforcement Investigation or to prevent Testimony in a Court Proceeding: (F)(12).

We suggest that this aggravator may also be dismissed without much further evidence or argument. What we observed in our Motion to Dismiss remains unchallenged: there was no "official law enforcement investigation" at the time of Ms. Kennedy's death; there was no evidence that she would be a witness in any court proceeding; and there was certainly no evidence that Mr. DeMocker had any knowledge

that she might have intended to testify or cooperate in some way against him. (Motion at 7-8.) After the *Simpson* hearing, this Court found that there was **no** evidence supporting these conclusions (*Simpson* Order at 2-3.).

It is worth noting, first, that the State's theory seems to have gone through something of a transformation since January. At that time, the State seemed focused on the argument that Carol Kennedy was killed to prevent her from turning Mr. DeMocker into the IRS. In this hearing, we saw the State appear to want to change the focus toward some endeavor to prevent Carol Kennedy from going back to divorce court. Presumably, the testimony of Mr. Echols was offered by the State to provide evidence that what was lacking in January has now materialized, i.e., that there is proof that Mr. DeMocker had committed fraud or perjury in his divorce or on his tax returns. Several conclusions should be evident. First, there was nothing new in the testimony or report offered by Mr. Echols. That alone should end the *Chronis* inquiry on this point. Second, there is the elusive suggestion that Carol Kennedy "threatened" to go to law enforcement or the Government to turn Mr. DeMocker in. Hours of direct and cross-examination left the Court with no testimony that could be relied upon in support of that suggestion. A review of the e-mail exchanges revealed no such threat. We collected in a single exhibit twenty e-mails exchanged before and after March 2008 (Exhibit 138) dealing with the dispute over the alimony deduction that Steve DeMocker intended to claim, on the advice of his accountant. Mr. Echols was not able to identify any other messages that might have existed that were not included. To the contrary, the only e-mails that seemed to deal with the question of whether Carol Kennedy might seek any relief either in setting aside her divorce or in attacking Steve DeMocker's 2007 tax return point clearly to the conclusion that she had no intention of pursuing a course that she recognized was likely to be more harmful to her than to him. It is also worth recalling that Cynthia Wallace testified in the *Simpson* hearing that during an emotional

meeting with Carol Kennedy on June 25, 2008, Ms. Kennedy did not say anything about taking Steve DeMocker back to court. (Wallace testimony at 20, ll. 12-14.)

Finally, there is the "book of business" issue that seemed to be Mr. Echols' primary topic of interest. His allegation was that Steve DeMocker had engaged in fraud against Ms. Kennedy when he did not list his UBS "book of business" in a financial affidavit he filed in the divorce proceeding. Yet, the testimony clearly confirmed that Mr. Echols had no evidence to offer that Mr. DeMocker hid his position on this subject from his wife. Indeed, Mr. Echols acknowledged that the topic of Mr. DeMocker's UBS client base was well known to both sides in the divorce proceedings. Both sides were represented by counsel. Both sides had accounting professionals assisting. There were two mediation sessions and ultimately a court settlement. Mr. Echols had little choice but to admit that – at best – the question of valuing the so-called book of business was a debatable subject, and he had to also admit that he had no evidence to offer in support of any criminal intent on the part of Mr. DeMocker.

Mr. Echols also argued during his testimony that Mr. DeMocker had committed "fraud" on his financial statements by not including as an asset the balance of his Employee Forgivable Loan ("EFL"). Repeatedly, Mr. Echols suggested that there had to be something fraudulent about showing the taxes due as a liability while not treating the EFL as an asset. We hope that the cross-examination made clear that Mr. Echols was just simply wrong on this issue, but it may be more important to remind the Court and the prosecution that this was not an issue in the divorce. There is also no indication that Carol Kennedy ever raised this after the divorce with anyone. Therefore, there is not even a theoretical link between the EFL treatment and the motive ascribed to Mr. DeMocker.

Rule 13 requires "substantial evidence" to support the claimed aggravating factors. Quite apart from failing to show the existence of any motive to want to eliminate a witness, the record offers no support for the notion this aggravator was ever

even contemplated to be available in a case in which there is no pending official law enforcement investigation and no court proceeding. We suspect that every experienced Superior Court Judge would be able to trace the long and often tedious steps that might ensue when any party seeks to modify a final divorce settlement. Homicide as the solution to preventing a hypothetical effort to re-open is hard to imagine – and there is certainly no evidence to support the argument this was actually Ms. Kennedy's intent.

(3) "Pecuniary Gain:" (F)(5).

It is useful to start with the words of this statutory aggravator. The homicide must be shown to have been "committed . . . as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value." As with other statutory factors, this one must be strictly read if it is to achieve the result of narrowing or channeling the fact-finders' isolation of the cases that might warrant a death sentence from the homicide cases that do not. It is not enough that money might in some way be theorized to be advantageous to the defendant. *State v. Correll,* 148 Ariz. 468, 715 P.2d 721 (1986). This limitation on the resort to "pecuniary gain" as an aggravator was certainly the law before the advent of jury fact-finding in capital sentencing, and it has become even more important today. To avoid the potential over breadth of this factor, a "fact-intensive" inquiry is required, one in which the State must prove a connection between the murder and motive. E.g., *State v. Armstrong,* 208 Ariz. 360, 93 P.3d 1076 (2004).

This Court observed during our in-chambers conversation on November 4 that it had first addressed the issue of pecuniary gain in this case in the *Simpson* hearing. While the allegation was found wanting at that time, the Court now correctly observes that the standard of proof in a *Chronis* hearing is different. The proof presented by the State then and now, however, continues to be well below even the more relaxed standard of probable cause. In our Motion to Dismiss we summarized a number of this Court's comments on the absence of proof of a financial motive (DeMocker Motion to

Dismiss at 7). The best single summary of this Court's assessment of the evidence ten months ago was this: *"[no] financial motivation has been demonstrated."* Order of January 22, 2009 at 5 (emphasis supplied). As the long line of Arizona "pecuniary gain" cases make clear, proof of motive is critical.

Neither the State's evidence nor its argument seems to have changed since this Court's *Simpson* ruling. It remains difficult to see any evidence that was offered within the last few days that is of a different or more substantial quality. The aggravator, as far as can be determined from this record, is virtually indistinguishable from the witness-elimination argument.

We have combed the testimony for any argument that might look with particularity at the questions relevant to "pecuniary gain." At the end of this hearing, we presume the State will simply argue that Mr. DeMocker killed "in expectation of" ending future alimony obligations and receiving the proceeds of two old life insurance policies in which he was still named as beneficiary. Those facts are no less or more true whenever the death of a former spouse occurs after a divorce settlement with monetary terms. A theoretical connection that can be imagined based on the effect of a homicide, does not constitute proof of motive. Circumstantial evidence might be relevant to proving a connection, but cause-and-effect do not establish *expectation.*

(4) Especially Cruel, Heinous or Depraved: (F)(6).

We have filed a separate motion with respect to this aggravator. In order to avoid the conclusion that this aggravating factor is unconstitutionally vague and potentially arbitrary, the State must elect which of these three terms it intends to pursue. *See* Defendant's Motion to Require the State to Elect Which Prong of the (f)(6) Aggravator it is Alleging, dated October 6, 2009. The State has yet to identify any specific prong it intends to rely upon, but the testimony offered by Dr. Philip Keen and by former Detective Brown would appear to leave little room for the State to argue that the attack that led to Carol Kennedy's death was "especially cruel." If that term is

defined to require proof of great pain or conscious suffering (*see, e.g., State v. Newell,* 212 Ariz. 389, 406, 132 P. 3d 833, 850 (2006); *State v. Anderson,* 210 Ariz. 327, 111 P.3d 369 (2005);), the proof that the victim would not have been rendered unconscious by the first blow to the head must be dispositive. Testimony of Dr. Keen, 10/28/09 at 21-22. At most, the victim might have sustained two blows while conscious if the marks on her right forearm are theorized to be defensive wounds. There is also a theoretical possibility that the wound above the victim's left eye could have preceded the first blow to the head (*Id.* at 49-51, 56-57), but even that possibility is not supported by anything other than theory. Dr. Keen could offer no medical testimony, or cite to any physical evidence, that would constitute substantial evidence that these non-lethal injuries were sustained while the victim was in a state of consciousness.

We must suppose, therefore, that the State will claim in light of this testimony that the homicide was especially heinous or depraved. But, for either of these findings to be deemed probable there would need to be some evidence of the state of mind of the attacker – something to suggest "relishing" the crime, "needless mutilation," "senselessness," or the infliction of "gratuitous violence." *See* DeMocker Motion to Dismiss at 11. Arizona cases have come to recite considerations that are now most often what are known as the "*Murdaugh*" factors. *State v. Murdaugh,* 209 Ariz. 19, 31, 97 P.3d 844, 856 (2004). The State has offered no evidence of any of these factors. The scene of her death is a scene of a violent encounter. There is some limited evidence that the State accepts that there was a struggle. The broken fingernail might be seen to support that conclusion. Testimony of Dr. Keen, 10/28/09 at 26. The State's witness brought to this hearing to describe the scene, however, himself dismisses other evidence that might otherwise be thought to be proof of a violent struggle. The disarray in the room where the body was found, the fallen bookcases, the ladder, are all claimed by the State as evidence of some effort after the fact by the attacker to make the scene appear to have been one of violent struggle. Testimony of Doug Brown, 10/28/09 at 166-69. If

that hypothesis were accepted, however, it would seem completely contrary to the concepts of heinousness or depravity occurring at a level that might distinguish this homicide as among the death-deserving category of the worst of the worst. It is important that words like "especially" be given serious meaning. Otherwise, there will be little substance to the basic principle that a constitutionally acceptable statute must distinguish the worst from the rest. *See Maynard v. Cartwright,* 486 U.S. 356 (1988); *Godfrey v. Georgia,* 446 U.S. 420 (1980).

The Arizona Supreme Court in *Chronis* intended to confirm the existence of a burden on the State to support any aggravating factor by evidence – evidence of a quality to render the factor probable and supportable by reference to substantial evidence.

(5) Conviction of a Serious Offense Committed on the Same Occasion as the Homicide: (F)(2).

We have addressed this last aggravating factor in our Motion to Dismiss (pp. 4-6). It is now apparent, as we assumed, that the State intends to sustain this aggravating factor with the proof that the attacker entered or remained inside Ms. Kennedy's residence while armed with a deadly weapon. As best as can be inferred from the State's witnesses, the theory on which the State will rest is that Steve DeMocker entered the house at Bridle Path, that he did so with the intent to kill Ms. Kennedy, and that he did so armed with a golf club that he must have known was already there. No murder weapon has been found. The golf club theory appears to be based on an early impression that Dr. Keen first formed and suggested during the autopsy. He suggested that wounds to the head were consistent with the head of a golf club. He observed that the linear wounds on the victim's right arm might be consistent with the shaft of such an instrument, although he freely admitted in this hearing that other objects might have caused the injuries he saw at autopsy, and that multiple assailants wielding multiple

weapons was a possibility as well. The improbability of this scenario as part of a planned aggravated burglary and killing is obvious.

We have very serious doubt about whether this aggravator if broadly applied could survive Constitutional scrutiny. Applied broadly to every armed home invasion – or any home invasion in which something that might be used as a weapon might have been found – this aggravator would sweep into the death penalty-eligible crime category an enormous category of homicides that we doubt were intended for inclusion. One can see the sense of a "narrowing" factor that might include rapes or robberies occurring in conjunction with a home invasion homicide. A broader legislative intent to include all "armed" home invasions seems on its face to be highly problematic. Can it fairly be said that such a law would "genuinely narrow the class of persons eligible for the death penalty"? *Zant v. Stephens,* 462 U.S. 862 (1983).

III. CONCLUSION.

Two statements in the Arizona Supreme Court's *Chronis* opinion seem particularly pertinent at this stage of this hearing. The first is the reminder by the Court that the burden of proving the existence of probable cause remains with the prosecution. Slip op. at 9. It is decidedly not Mr. DeMocker's duty to disprove any of these allegations. Closely related is a second observation: "[p]rosecutors are ethically bound not to allege aggravating factors that they know are not supported by probable cause." *Id.* at 10. It is quite plain that this sentence is in Justice Bales' opinion for a unanimous court for a reason. The court wanted to emphasize that imposing this duty to identify the facts supporting each aggravator should pose no serious difficulty to prosecuting agencies that have done their investigations sufficiently before seeking an indictment. These words from the court should be called to mind every time the State's witnesses said – as they too often did in this proceeding – that their work continues and that they are still gathering evidence. Deputy Page is still looking through voluminous computer data (Tr., 10/28/09 at 76-77); and Mr. Echols is still pursuing his "forensic" examination

in search, apparently, for proof of a threat that might have triggered a homicidal act. (Tr., 11/3/09 at 42-44). All of this continuing investigation is in the face of orders from this Court establishing deadlines for the production of evidence. Respectfully, we suggest that our Arizona Supreme Court did not envision a probable cause hearing under Rule 13 that would have instead triggered a frantic search for new evidence to sustain the State's burden of proof. We also observe that these five alleged aggravating circumstances are inconsistent with each other in ways that suggest a sort of "pleading in the alternative" often seen in civil cases. For instance, killing just for the thrill of killing is not consistent with the proof of motive necessary to establish a "pecuniary gain" aggravator. The same obvious inconsistency exists between killing to eliminate a witness and gang-initiation or thrill killings. It remains apparent that there cannot be probable cause supporting these incompatible claims.

This has never been a death penalty case, a point which seems even more clear today than it did at the time of this Court's *Simpson* Ruling. Despite more than fifteen months of intensive investigation, the State has not turned up any substantial evidence to support any of the five capital aggravators it has alleged. What this Court found totally lacking in the State's case after the *Simpson* hearing is still absent, and as a result, this Court should determine that this prosecution should proceed as a non-capital case.

DATED this 16th day of November, 2009.

By: _____

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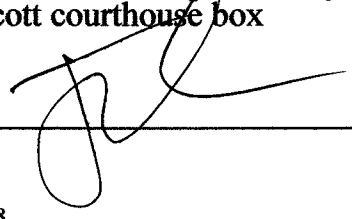

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Transcription from CD
Senate Judiciary 02-14-05 SB1429

Female: Mr. Chairman, members of committee, Senate Bill 1429 broadens the definition of a victim. When the person against whom the act was committed is killed or incapacitated, it broadens that definition to the person's spouse, parent, child, grandparent or sibling, any person related to the person by blood or marriage to the second degree, or any other lawful representative of the person.

The bill also requires that the trial--the trial court to impose a naturalized sentence when the person is found guilty of first degree murder if the Trier of fact found aggravating circumstances and determines that the defendant has proven by preponderance of the evidence mitigation sufficiently substantial to warrant leniency.

Senate Bill 1429 prescribes new aggravating circumstances that the Trier of fact must consider in determining whether to impose a sentence of death. These include the defendant committed the murder to promote further, to promote further assist or join a street gang or criminal syndicate, the defendant committed the murder because the victim or the victim's immediate family member witnessed a crime and was killed to prevent that person's testimony or was killed in retaliation for the person's testimony or cooperation with law enforcement, the murder was committed in a calculated manner without pretense of moral or legal justification, the victim was a vulnerable adult or the defendant stood in a position of familiar or custodial authority over the victim.

It also specifies when the state or the defendant bears the burden of proof and sentencing and adds to crimes to the less of serious offenses for the aggravating circumstances and sentencing.

SB 1429 also permits a licensed psychiatrist to determine whether a capital defendant has a mental retardation, or stipulates that if a capital defendant raises a mental health defense, the prescreening evaluation for competency must be released upon motion by any party.

Mr. Chairman, there is an amendment. Would you like me to explain it?

Chairman: We're going to hold off this time. Sally and James Golser, can you both come up, if you're still here? If you don't mind, if you could--you could just stand side by side there at the--

Sally Golser: No, that's fine. I'm sorry, I'm just having--having terrible coughing spasms today, so _____--

Chairman: You can--if you can tell--

Sally Golser: Oh, excuse me.

Chairman: --briefly the circumstances and express your _____.

Sally Golser: Oh, you want to go first?

James Golser: Sure. Mr. Chairman, members, we just want to put a personal face on what has been stated in these added aggravating items. Sally's brother, my brother-in-law, was accosted at an ATM machine, a gun was held to his head asking for his card so he--so the assailant could get some money. Shortly thereafter, Sally's brother continued to pursue this guy through the police, identified this assailant, and from there on the harassment started. Bad news, the assailant was a member of the New Mexican mafia and the--the intimidation was continuous at that point. Hal--Hal Bowen was the victim's name--he wouldn't back down. He was continuing to offer himself as a--as a witness in the prosecution of this assailant. His reward was that he was murdered. He was murdered in a--in an ambush--two people--the person who was the assailant and his initial contact, and another person along with them. These two men were convicted and they were--they were finally sentenced to life imprisonment with no parole. However, subsequently, we've learned that the second man was a initiating--an initiant into the--into the mafia and was used by the assailant to kill Mr. Bowen on the night of the assassination. So, we have two situations that are relevant in this particular piece of legislation, where our family has been deeply damaged and injured, and the period of literal--literal hell that went on with Mr. Bowen during the period, from the time of the incident at the ATM machine until the time he was finally murdered was constant harassment. And it's a--it's the kind of thing that destroys the public's image of the justice system, and it leads to the reluctance of many citizens to participate in the justice system. So, we just strongly ask for the committee to consider favorably these added aggravation items.

Chairman: I want to thank you for your brother's courage. I mean, he died for that courage, but I want to thank you all that much more for it because you're the witness to his willingness to not--to stand up, and he paid a heavy price for that.

Sally Golser: Well, I think he paid a heavier one, I mean, we're living and he--The other thing I just want to add is that the night they killed him, Item Number 13 in the--in your amendment talks about cold, calculated. I mean, they knew exa--they were killing Hal. It was a--it was a--it was an ambush, it was a hit, as you say, I guess, because they had warned Hal that if he testified--the trial was to come up in January of '96, and this was Thanksgiving eve in '95--and Hal

still--Hal had purchased two guns, he had police protection part time. This does happen. We're not the only ones. We go around the nation now, we're involved in victim's rights. And it was a cold, calculated, bloody, nasty murder, and they shot another man because they shot the wrong man first. And the one guy that had assaulted Hal was pointing. We had witnesses, we had witnesses that said exactly what happened, and he literally got the other guy to shoot Hal. And that's as cold-blooded as it can get, I think, in these times. Anyway, thank you for hearing us and--

Chairman: Thank you for being here. I, you know, I'm the prime sponsor of the bill, and a lot of times I don't know--

Sally Golser: Thank you.

Chairman: --that people are waiting here this long, and I apologize for having you wait so long.

Sally Golser: Oh, no, no. We'll wait forever. I just apologize my coughing spells. I am sick and it's important to be here, so thank you.

Chairman: Okay.

Male: Thank you.

Chairman: Carol Gackseola.

Mayer: _____ Gackseola, Mr. Chairman, was unable to _____.

Chairman: Yes. Could you please come forward and speak on her behalf?

Mayer: Mr. Chairman, members of the committee, my name is Kathleen Mayer, and I'm with the Pima County Attorney's Office. Carol Gackseola was the mother of a victim of a homicide in our county as it relates to one of the particular aggravators I would like to address, if it's--

Chairman: Please do.

Mayer: Thank you. One of the proposed aggravators involves, as just touched on, the murder of individuals who are witnesses to crimes, either to punish them for their cooperation with law enforcement or with prosecution, or, as I would propose, to stop them from cooperating with law enforcement in order to conceal the identity of criminals. And I'll give you an example from Carol Gackseola's case.

Her daughter Jasmine, when she was murdered, was 14 years old. She had the misfortune of having gained some information about a drive-by shooting from one of the participants in that shooting, though she was not a direct witness. She urged some of the individuals who were involved with that to cooperate

with law enforcement, and she was planning, as well, to go to law enforcement to give them information that she knew about the drive-by shooting and the other participants therein. The ultimate murderers of Jasmine Gackseola learned of this, took her and her boyfriend, who was an unwitting participant in that drive-by shooting, out into the desert, attempted to murder the young man, he survived, Jasmine was not, she was executed, she was shot through the eye and left to bleed to death in the desert. There wasn't even a law enforcement investigation at--open at the time, other than just looking for the witnesses. There was no pending prosecution, no one had been indicted. So, one of the things that Carol Gackseola asked me to address with you that, in addition to the Pima County Attorney's support for this bill in its entirety, is to take a look at that aggravator and add some language to it which would have protected Jasmine. In other words, someone who had information about a crime, even though she was not a direct eye witness and had not yet been prepared to testify. There was no pending prosecution but, in an effort to conceal their identities, they stopped her from cooperating with law enforcement. I'm happy to answer any questions.

Chairman: Okay. Thank you very much for being here. Senator Martin, can you move the bill?

Martin: Mr. Chairman, I move Senate Bill 1429 do pass.

Male: You can have Mr. McMurdy testify of a couple legal questions for him.

Chairman: Mr. McMurdy, can you come forward?

McMurdy: Chairman, I'm Paul McMurdy, Deputy County Attorney, Maricopa County Attorney's Office. I'm here in support of the bill. We think this is a very important bill as far as the overall administration of the death penalty, and also we support the aggravatings factors as listed.

I'd like to point out just briefly some of the other parts of the bill that we think are very important and why we would urge the committee to support the bill. Currently under present law, you may not know this, but a psychologist is the only one that can testify on whether or not someone has mental retardation. There's an oversight on the part of the Attorney General's Office and the County Attorney's Office when the bill was introduced--the original bill was introduced. But recently one of the most renowned psychiatrists in the state of Arizona was hired by Maricopa County at expense of almost $10,000, and after he had prepared all of his work and was prepared to testify, the defense moved to strike him based solely on the point that he was a psychiatrist and not a psychologist. Was it--when that came to our attention, we immediately realized that this is a situation that needs to be changed, and that's part of the impetus in this bill. It would allow for both psychologists and psychiatrists to testify.

Regarding the other part of this bill, the definition of victim--just to put a face on why we want the definition of victim to change. Recently in a capital sentencing, one of--the aunt of the victim who had been killed, she was, in fact, for all practical purposes, the person who raised the victim. She was a--she wanted to testify and give a victim impact statement. Because she did not meet the technical definition of victim, as listed in the statute, the judge precluded her from giving a victim impact statement to tell about the devastation that was wreaked on her life when this young girl that she had raised to an adulthood had been killed. The County Attorney's Office believes that it's important that all victims in all forms be able to express exactly how important it was that that victim--to put a face on the victim and to make the jury understand exactly who it was this person murdered.

The County Attorney's Office will tell you that the genesis of the aggravating factors started originally with the AG's Capital Commission. It was during that Capital Commission we realized that there is a certain segment of our capital prosecutions that simply don't have particular aggravators, and that's in gang-related crimes and activities, as it was described for you here today. It's because o f that the County Attorney's Office has asked that the legislature include these aggravating circumstances, to include, while they won't be a vast number of cases, probably just a handful. These are very important cases, cases where the killing was simply to in--for init--gang initiation or to promote a criminal street gang or a criminal syndicate, _____ killing to eliminate a particular witness, or simply thrill kill.

Recently, in an ongoing case so I can't give you too many details, but we have evidence of a long diary where two individuals had planned to kill someone, it didn't matter who, and how they were going to carry it out. They did this for months. Randomly, they picked someone out and simply murdered him for no other reason than the thrill of killing another human being. It may not--it may surprise you or it may not surprise you that no aggravating factor exists in that case. There were--these two individuals had no other prior record. The County Attorney, on investigating this crime, were shocked and outraged to think that this type of murder simply wouldn't fit within our definition of someone who deserved the death penalty.

Therefore, the County Attorney's Office would request that the bill, as Senator Hoopenthal has introduced, be passed. And I would certainly answer any questions the Committee have concerning this bill.

Male: _____.

Brotherton: Chairman, Mr. McMurdy, so I guess the page 4, line 29, the offense committed a calculated--that's a--that's the thrill kill--I was wondering what that exactly was, then so--

McMurdy: Mr. Chairman, Senator Brotherton, yes, and actually that language is adopted from a Florida statute, and there is a body of law in Florida that deals with how that has been defined and determined, and it basically is something way beyond just the premeditation. It's the example I gave where it was clear, for two months these two individuals had planned something out, and there was no other justification for that homicide, other than simply wishing to kill.

Brotherton: And on line, Chairman, line 31, _____ number 14, what is the--when you're--I guess it's line 32, when you're talking about familiar relationship, what is the degree of consanguinity we're talking about? Is it the same as under 8-382. Twenty? Or is it--

McMurdy: Mr. Chairman, Senator Brotherton, I believe that is correct. In the--in defining this, they were looking at the situation where, in effect, you have a vulnerable adult or a child that is in that type of a relationship.

Male: Thank you.

Chairman: We've moved the bill. Have we also moved the amendment? Okay.

McMurdy: I can briefly--Mr. Chairman, I can briefly explain the amendment, if I understand--it's a technical amendment to incorporate what this bill does, is if someone is convicted of first degree murder and has an agg--and the state has proven beyond a reasonable doubt an aggravator, then the minimum sentence that can be imposed is natural life. And in the--the amendment is a technical amendment that incorporates that throughout the remaining sections of the _____--

Male: Is this an amendment without objection, or is this--this--so it's a regular amendment? Senator Brotherton.

Brotherton: Object--question. I didn't know you were going to offer that amendment, but it's, Chairman and Mr. McMurdy, so this is currently in law or this is not currently in law with the amendment?

McMurdy: Senator Hoopenthal, Senator Brotherton, no, the bill as introduced has it in 703 that would eliminate--what makes it so that it's an aggravating--that if there's aggravators, prove the minimum is natural life. To correspond through that throughout the other sections of the call it the amendment as necessary.

Brotherton: So--and under current law, Chairman and Mr. McMurdy, because now the decision of death is done by the jury. If a jury decides that death is not appropriate in a case, then the judge has the decision of life--natural life or life being 25 or 35 years flat to life. Is that correct?

McMurdy: Mr. Chairman, Senator Brotherton, that is correct. That's the current--the way the law exists today.

Brotherton: If we change this bill and with this amendment, it would go from--you would be taking away one of the options that the judge would have if death was not imposed, and the only option would be natural life?

McMurdy: Mr. Chairman, Senator Brotherton, that is correct. Many states have that situation and, most notedly, California. Once an aggravator is proved, it elevates the crime, and the notion is that the only option available for that particular individual should be either natural life or death.

Brotherton: And when--Chairman, Mr. McMurdy, this is regardless of how many mitigators there may be found, is that correct?

McMurdy: Mr. Chairman, Senator Brotherton, that would be correct.

Brotherton: Mr. Chairman, I have a problem with that part of the bill.

Chairman: Okay. We have here in support, Kathleen Mayer, Pima County Attorney; Sally Goldser, who was up; Paul McMurdy, who was up; Fran Sawyer, Arizona State Fraternal Order of Police; and Edmund Cook, Arizona Prosecuting Attorneys Advisory Council. Senator Martin, can you move the Hoopenthal amendment?

Martin: Mr. Chairman, I move the amendment with your name on it, dated 2-11-05, at 1:23 p.m.

Chairman: On the Hoopenthal amendment, further discussion, all those in favor signify by saying aye.

Many: Aye.

Chairman: Opposed, nay. The ayes appear to have it, do have it, so ordered. Senator Martin.

Martin: Mr. Chairman, I move Senate Bill 1429, as amended, do pass.

Chairman: Okay. You've heard that motion. Further discussion? Secretary will call the role.

Secretary: Senator Gary Brotherton.

Brotherton: _____ my vote--

Chairman: Senator Brotherton.

Brotherton: --Mr. Chairman. I'm not a supporter of the death penalty anyways, but the way the bill's written, from the standpoint of narrowing the number of options that a judge has after a jury has decided that death is not appropriate concerns me greatly. You could have a situation where the aggravator were something

that were done for pecuniary gain, a robbery. And maybe this individual had no prior offenses, was young, etc., etc., from the standpoint of mitigation. But with the bill as it's currently written, and with the amendment, that person, say at maybe age 17, 18, they've been transferred up, would have to serve an natural life sentence and it cou--would not be something where the Board of Executive Clemency at some point, after 25 years flat or 35 years flat, could look at that person after all that time had passed, even though they'd committed the offense in their youth, and make a decision on whether or not, at--in their 50s or maybe 60s, that they should be released. And I don't feel we should be slamming the door, from the standpoint that, you know, especially when I think with options available, those things should be left in place. So, I have to vote no.

Secretary: Senator Golden.

Golden: Aye.

Secretary: Senator Harper.

Harper: Aye.

Secretary: Senator Jarrett.

Jarrett: Aye.

Secretary: Senator Maranda.

Maranda: Mr. Chairman, very briefly. I think I'll go ahead and, out of the committee, just vote yes, but I'm concerned with what Senator Brotherton brought up, and I'm not sure, after the committee, whether I'll support this bill or not. But I vote aye.

Secretary: Senator Martin.

Martin: _____ my vote. I really wished we didn't need the bill like this. I really wished the stories that we'd heard had never occurred, and--but since they do, since they have, I am glad to vote aye.

Secretary: Senator Hoopenthal.

Hoopenthal: To explain my vote, I'm going to ask Mr. McMurdy to--if we were going to modify the amendment or modify the bill to take into account Senator Brotherton's concerns, if you could send me a few paragraphs on how we might do that and what the implications would be for what we're trying to do here. And I vote aye.

Secretary: _____.

Chairman: You voted six ayes and one no and one not voting in return Senate Bill--

Secretary: 1429.

Chairman: --1429 to the full senate with a do pass recommendation. Or are we--have we gotten them all?

Male: Drum roll.

Chairman: In the last four years, I have not had any of my committees last for more than two hours, and I'm just getting beat to a pulp on this one here, guys, but I thank you for hanging in there with me, I very much appreciate it.

[END OF RECORDING]